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No. 04-3571
DiCenzo v. Rose

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ALFRED L. DICENZO,¹

Petitioner-Appellant,

No. 04-3571

NORMAN ROSE, Warden,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 03-00602—Ann Aldrich, District Judge

Submitted: July 27, 2005

Decided and Filed: June 16, 2006

Before: MOORE and COLE, Circuit Judges; WISEMAN, District Judge.

COUNSEL

ON BRIEF: Carlos Warner, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio; John T. Martin, CITY OF AHOGA COUNTY PUBLIC DEFENDER, Cleveland, Ohio, for Appellant.
Stuart A. Cole, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellee.

AMENDED OPINION

R. GUY COLE, JR., Circuit Judge. Petitioner-Appellant Alfred DiCenzo appeals the district court's dismissal of his habeas petition on the ground that the petition was not timely filed. Following a guilty plea to vehicular homicide, DiCenzo was given the maximum sentence under Ohio law, but claims he was never informed by either the trial court or his attorney that Ohio affords those sentenced to a maximum sentence a non-waivable right to a direct appeal of their sentences when DiCenzo finally became aware of this right; he filed a motion for delayed direct appeal, but this motion was denied by the Court of Appeals of Ohio and the Supreme Court of Ohio. He then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in federal district court, alleging that his constitutional rights had been violated both by the trial court when it did not inform him of his right to appeal, and by the state appellate court when it refused to consider his delayed

appeal. The district court determined that the petition was untimely, and dismissed it without reaching the merits. Because we find that the portion of DiCenzo's petition relating to the Ohio appellate courts' decision was timely, and because we find that the district court failed to determine conclusively whether DiCenzo was diligent during the time when he claims to have been unaware of his appeal rights, we VACATE the district court's dismissal of the petition and REMAND for further proceedings consistent with this opinion.

1.

On May 27, 1999, in the Cuyahoga County Court of Common Pleas, DiCenzo pleaded guilty to aggravated vehicular homicide and aggravated vehicular assault. He was sentenced to five years imprisonment on the vehicular homicide count and eighteen months on the vehicular assault count to be served consecutively. This constituted the maximum possible sentence for these convictions, and thus under Ohio law the sentencing judge was required to make certain specific factual findings and inform DiCenzo of his right to appeal if his guilty plea (Ohio Rev. Code §§ 2953.08(A)(1)(b), 2953.08(A)(c)), Alsentencing, however, the trial judge did not inform DiCenzo in which he argued that good behavior rendered DiCenzo eligible for probation. This motion was denied on April 14, 2000. On March 13, 2001, DiCenzo filed a *pro se* motion for conviction purposes to avoid duplicate punishment for the same acts. No court appears to have acted on this motion. Then, in August 2001, DiCenzo contacted the Cuyahoga County Public Defender's office ("Public Defender"), who informed him of his right to appeal his sentence. As a result, DiCenzo immediately filed a motion for leave to file a delayed appeal of his sentence on August 23, 2001. This motion was denied by the Ohio Court of Appeals on September 25, 2001.

At this point, the Public Defender independently decided to investigate the case. After examining the sentencing transcript and determining that DiCenzo had never been notified of his right to appeal, the Public Defender agreed to represent DiCenzo and, pursuant to Ohio Appellate Rule 26, filed a motion for reconsideration in the Court of Appeals of Cuyahoga County on October 24, 2001. The motion was denied without opinion on October 24, 2001. The Public Defender then filed a motion to file an delayed appeal in the Supreme Court of Ohio on November 16, 2001, arguing that DiCenzo had been denied his right to due process under the U.S. Constitution by the state's failure to grant him the right to a delayed appeal when he had been unaware of his right to appeal prior to August 2001. Though this motion was granted, the Supreme Court of Ohio later dismissed the appeal.

DiCenzo, still represented by the Public Defender, then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in federal district court, alleging: (1) a Sixth Amendment violation arising from his attorney's failure to notify him of his appeal rights; and also three due process violations arising from: (2) the trial court's failure to afford him the required protections of Ohio law in imposing a maximum sentence, (3) the trial court's "failure to advise him of his appellate rights; and (4) the state appellate court's "refusal to allow him to file a delayed appeal." A magistrate judge recommended dismissal of the petition, finding both that the petition was not timely filed and that equitable tolling was not warranted. Over DiCenzo's objections and after a *de novo* review of the record, the district court dismissed the petition as untimely for effectively the same reasons as those found in the magistrate judge's recommendation, but granted a certificate of appealability as to the timeliness issue. The Public Defender timely appealed on DiCenzo's behalf.

¹ The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

II.

A. Standard of Review

Since the only issue on appeal is whether the district court properly calculated the timeliness of DiCenzo's habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),¹ Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2244(d)), we review the district court's interpretation of the statute de novo. See, e.g., *Milner v. Collins*, 305 F.3d 491, 493-94 (5th Cir. 2002). The relevant AEDPA statute of limitations is as follows:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;² or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

¹ 28 U.S.C. § 2244(d)(1).

DiCenzo's petition raised four grounds for granting a writ of habeas corpus. Claims (1) through (3) deal with matters that occurred at sentencing, and claim (4) deals specifically with a denial of the Court of Appeals. We will consider the appeal-based claim first, and then proceed to evaluate the sentencing-based claims.

B. Claim Based on the Ohio Court of Appeals' Denial of Delayed Appeal

DiCenzo first claims that the appellate court improperly refused to allow him to file a delayed appeal. This claim accrued when the Court of Appeals for Cuyahoga County denied DiCenzo's motion for delayed appeal, on September 25, 2001. Therefore, under 28 U.S.C. § 2244(d)(1), the AEDPA "clock" began running on September 25, 2001. See 28 U.S.C. § 2244(d)(1)(D) (indicating the one-year AEDPA requirement on the date upon which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence).

² The Plaintiff Defendant filed a motion for reconsideration in the Court of Appeals during this time, and that motion was denied on October 24, 2001. It is unclear whether motions for reconsideration filed pursuant to Ohio App. R. 26(A) toll AEDPA's statute of limitations. See *D'Angelo v. Leffler*, No. 71-3899, 137 F.3d 949, 951 (6th Cir. 2003). Because we find DiCenzo's petition timely even if the period between October 5 and October 24 is not tolled, we need not decide whether motions filed pursuant to R. 26(A) toll AEDPA's statute of limitations.

DiCenzo did not file an motion to appeal in the Supreme Court of Ohio until November 16, 2001, fifty-two days after the Court of Appeals denied DiCenzo's motion for delayed appeal. In DiCenzo's November 16 motion, he presented, in accordance with Ohio procedural rules, reasons why the Supreme Court of Ohio should hear his appeal despite the fact that the applicable time limit for direct appeals had ended. Such a motion for delay on appeal, even if granted, does not restart the statute of limitations, but if properly filed, it tolls the statute during the time the motion was pending. See, e.g., *Sacrey v. Carter*, 246 F.3d 515, 519 (5th Cir. 2001) (holding that motions for delayed appeal toll the AEDPA statute of limitations under 28 U.S.C. § 2244(d)(2)). On that such motions are not part of the direct appeal for the purposes of 28 U.S.C. § 2244(d)(1)). Accordingly, the AEDPA clock was stopped with fifty-two days elapsed, as of November 16, 2001, pending the Ohio Supreme Court's consideration of DiCenzo's motion.

On December 19, 2001, the Ohio Supreme Court granted DiCenzo's motion for leave to file the appeal and ordered the parties to brief the jurisdictional merits of the appeal. On April 3, 2002, the Ohio Supreme Court concluded that DiCenzo's claim did not merit Ohio Supreme Court jurisdiction because no significant constitutional question was presented. However, the fact that the appeal itself was ultimately denied on its jurisdictional merits does not alter the fact that DiCenzo's AEDPA statute of limitations was tolled during the consideration of his motion, once it was accepted for filing. See *Bonilla v. Hurley*, 770 F.3d 494, 497 (6th Cir. 2004) (distinguishing between the denial of a motion to file a delayed appeal in the Ohio Supreme Court, a state procedural decision that would preclude tolling, and the granting of the motion to file the appeal but subsequent dismissal on the jurisdictional merits of the case, a decision on the merits that would not preclude tolling). The statute of limitations was thus tolled until the April 3, 2002 decision of the Ohio Supreme Court. Further, that court's decision not to hear DiCenzo's appeal, like all decisions of a state highest court, could have been appealed to the United States Supreme Court. Following the April 3, 2002 decision, DiCenzo thus had an additional ninety days³ worth of tolling in order to petition for certiorari, whether or not he actually did so. See, e.g., *Abels v. Martin*, 348 F.3d 164, 172-73 (5th Cir. 2005) (en banc).

Accordingly, ninety days after April 3, 2002, or as of July 2, 2002, the AEDPA clock began running again. From this time, DiCenzo had one year minus fifty-two days to file his federal habeas claim, or until May 11, 2003. His habeas petition was in fact filed on April 3, 2003. Accordingly, at least as to his claim that the Ohio Court of Appeals denied him due process when it denied his motion for delayed appeal, DiCenzo's petition was timely under AEDPA, since the petition was filed before the expiration of the statute of limitations.

C. Claims Based on Errors at Sentencing

DiCenzo's three other claims, that he was (1) denied his Sixth Amendment rights when his counsel was ineffective by not informing DiCenzo of his appeal rights; and that he was denied due process when the district court (2) sentenced DiCenzo to an illegal sentence under Ohio law; and (3) failed to inform DiCenzo of his right to appeal despite his guilty plea, all raise to events that took place at sentencing on June 30, 1999. Since there was no timely filed direct appeal, DiCenzo's sentence became final on July 30, 1999, see Ohio App. R. 4(A), and unless another provision of 28 U.S.C. § 2244(d)(1) applies, he had one year from this date to file a habeas petition under 28 U.S.C. § 2244(d)(1)(A). Obviously, even assuming that all of his later actions tolled the statute for certain periods of time, DiCenzo's habeas petition, filed on April 5, 2003, was not filed within one year of July 30, 1999. Accordingly, if the statute of limitations did indeed begin running on that date, DiCenzo's petition was not timely filed.

The main thrust of the non-equitable-tolling portion of DiCenzo's claim is that he could not have known about his right to a direct appeal of his maximum sentence until he spoke to the Public Defender in the summer of 2001, and thus that the statute of limitations on those claims should have

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DiCenzi also disputes the district court's conclusion that he is not entitled to equitable tolling. However, on remand, it may be found that DiCenzi was duly diligent, for statutory purposes, for a portion of the time of issue. Such a finding could affect any equitable tolling analysis, and we therefore need not address this issue at this time. Further, though DiCenzi does not assert that he is actually innocent of the crime for which he was convicted, on appeal he does argue the merits of his claim that he is somehow "actually innocent" of the sentence imposed upon him. The district court never reached the merits of the petition, so this issue simply is not before us now.

III.

For the preceding reasons, we VACATE the district court's dismissal of DiCenzi's petition and REMAND for proceedings consistent with this opinion.

CONCLUSION

I was once told by a older and very wise gentleman, who once owned a AAMCO Transmission Shop in Oakley, a suburb of Cincinnati and had passed the businesses on to his sons that a rule of honor and justice was very simple, and I quote What is good for the Goose is Good for The Gander, so the only fair and truthful conclusion that can be drawn from the ruling and the review of my letter to Judge Spiegel dated 7/20/04 is the same application of law that apply to Mr. DiCenzi must apply to me, the Petitioner.

Respectfully Submitted

Earl Ingels Pro Se.

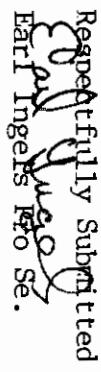
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Respectfully Submitted

 Earl Ingels Jr. Se.

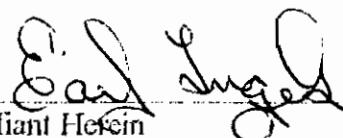
AFFIDAVIT OF INDIGENCE

STATE OF OHIO)
)
COUNTY OF WARREN) SS:

I, Earl Ingels, a United States citizen and affiant herein, after being duly cautioned and sworn, depose and say:

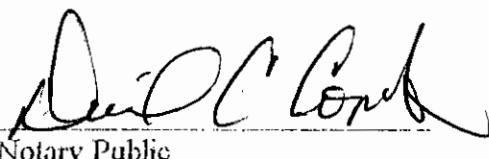
- (1) That I am currently incarcerated at the Warren Correctional Institution;
- (2) That I do not have the funds or monies to pay the costs within this action;
- (3) That I firmly believe that I am entitled to the relief requested;
- (4) That I am not represented by an attorney of law to undertake this task for me so I must proceed in *Pro Se*;
- (5) That I am indigent as defined by the Ohio Revised Code;
- (6) That all of the averments and statements contained herein are true and correct to the best of my knowledge and belief.

FURTHER AFFIANT SAYETH NAUGHT.


Affiant Herein

Sworn and subscribed to in my presence, a Notary Public, on this 6th day of

July, 2005


Notary Public

**David C. Combs Jr.
Notary Public
My Commission Expires: 6/28/09**